Supreme Court, U.S.
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No. 96-61

In The

Supreme Court of the United States

October Term, 1996

SHAWN PAUL NOVAK,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is the petitioner's fact-specific claim that his confession violated the Fifth Amendment worthy of certiorari review where:

   a. the petitioner voluntarily went to the police station with his mother and was not in custody until after he said he committed the crime and was then Mirandized before he made a further statement?

   b. the petitioner's attempt to manipulate the police simply backfired and his statements clearly were voluntary?

II. Even if the petitioner's confession had been improperly obtained would its admission have been harmless beyond a reasonable doubt?

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OPINIONS BELOW

The Supreme Court of Virginia's order refusing Novak's petition for appeal from the Court of Appeals of Virginia is unpublished. *Novak v. Commonwealth*, Record No. 951404 (January 10, 1996) (Pet. App. A1). The opinion of the Virginia Court of Appeals is published as *Novak v. Commonwealth*, 20 Va. App. 373, 457 S.E.2d 402 (1995). (Pet. App. A3-A44).[1]

STATEMENT OF THE CASE

Novak confessed to the March 4, 1991, murders of nine-year-old Danny Geier and seven-year-old Scotty Weaver on March 9, 1991. (Pet. App. A45-132). A juvenile petition was issued that same day, charging the 16-year-old Novak with capital murder in that he had premeditatedly killed the boys during the same transaction in violation of § 18.2-31(7) of the Code of Virginia. The juvenile court held a hearing pursuant to Virginia Code §§ 19.2-169.1 through 169.5 and then transferred Novak's case to the Circuit Court for the City of Virginia Beach for trial as an adult. A circuit court jury convicted Novak as charged on March 9, 1992. On May 4, 1992, the circuit court judge sentenced Novak to life in prison for the capital murder, and entered final judgment on June 15, 1992.

[1] Page citations herein either are to the petitioner's appendix (Pet. App. ___), the suppression hearing transcript (Supp. Tr. ___) or the trial transcript (Tr. Tr. ___).

STATEMENT OF FACTS

"Charles Manson was [Novak's] idol and he wanted to be just like him." (Tr. Tr. 485-487). Novak was known to roam the area of the Wadsworth Navy Housing Complex and to always carry a "buck" knife. (Tr. Tr. 490). About 5:30 p.m. on Monday, March 4, 1991, Danny Geier and Scotty Weaver were seen in Novak's company near some woods behind a McDonald's. (Tr. Tr. 476-484).

Neither Danny nor Scotty ever returned home, and their bodies were found by a search party the next day about 3:30 p.m. under "stacks of pine tree limbs." (Tr. Tr. 492-495). The medical examiner concluded that Scotty had "died as a result of . . . partial decapitation, the severing of the spinal cord in a vital area, which is between C3 and C4" (App. 800) and also had suffered three other incapacitating stab wounds (Tr. Tr. 978); Danny had "died as a result of blood loss from the severed carotid artery and vein as a result of the [six inch long] cutting wound of the neck," had suffered several stabbing type wounds and a blunt force injury to the head. (Tr. Tr. 573-577).

Shortly after the boys' bodies had been found on March 5, Novak "came into [Shane Young's] house and began to tell us that he found the children when they were at the search party. * * * He said [the bodies] were covered up with brush." (Tr. Tr. 548-549; 552-554). The members of the search party, however, were certain that Novak was not at the scene. (Tr. Tr. 503-504).

Novak told a classmate on March 6 how he had supposedly found the bodies and that the boys' throats had been cut. (Tr. Tr. 600). Yet, later that day, he "wanted

to know if the way the boys had died had been publicly announced yet." (Tr. Tr. 554).

When he told his friend's mother that he had seen the boys around 5:00 p.m. on March 4, she dialed the "hotline" the police had set up about the case and handed the phone to Novak, who then left his name and address. (Tr. Tr. 567). As a result of Novak's call to the "hotline," Virginia Beach Police Detective S. W. Hoffman interviewed the petitioner the evenings of March 6 and 7 while his mother voluntarily waited in the lobby. Novak was but one of several juveniles the police had talked to about the two boys. Novak was not upset after the interviews, and his mother said "he felt good that he was being able to help." (Supp. Tr. 20-21).

After these sessions, the detective had no reason to think that Novak was involved in the murders. (Tr. Tr. 622). Hoffman, however, had "learned through other interviews that [Novak] was a wealth of information throughout the neighborhood." (Tr. Tr. 622). The police thus asked Mrs. Novak if she and her son could return for additional questioning on March 8, but she could not arrange it. The officer just said, " '[T]hat's okay. We understand. It's getting too late to do it tonight anyway. They asked [her] to bring him on Saturday morning.' " (Supp. Tr. 23).

On March 9, Hoffman "wanted to talk to [Novak] about anything he may have seen or anyone that he may have seen in the area." Numerous breaks of up to 15 minutes were taken during the interview, during which Novak was free to roam the station by himself and was allowed to use the restroom facilities. (Tr. Tr. 622-623).

Mrs. Novak remained in the interview room the first hour, but then agreed to go to the lobby because the officer felt Novak would be more likely to tell him about his friends' habits if she were not present. She privately asked her son if "he would freak out" if she left, and he smilingly said "No." After Mrs. Novak had left the room, the petitioner went to the lobby on at least one occasion to tell her he was alright. (Supp. Tr. 25-26; 29).

Because of several statements and discrepancies in Novak's answers about the boys, however, Hoffman eventually tossed out to him, "You killed them, didn't you?" Novak paused, then nodded his head in the affirmative. When Hoffman repeated, "You killed Scott and Daniel?" Novak responded, "Yes." Hoffman read Novak his *Miranda* rights, and the petitioner indicated that he understood his rights and that he wanted to talk to Hoffman. Novak then detailed how he had gotten angry when one of the boys had tried to grab his knife and had chased Danny and Scotty down and stabbed them to death with his "buck" knife. (Pet. App. A106-110). The entire interview had lasted about two hours. (Tr. Tr. 622).

Officer James D. Price executed a search warrant at Novak's residence and found his knife lying on top of the dresser in Novak's bedroom. (Tr. Tr. 675-677). He also recovered a book entitled "Serial Killers" from Novak's room. (Tr. Tr. 680). Expert forensic testimony established at Novak's trial that the object which had made a bloody impression on Scotty Weaver's blue jeans either was Novak's knife or "another object having exactly the same features" (Tr. Tr. 714) and that the branches covering the boys' bodies had been cut by Novak's knife. (Tr. Tr. 728-730).

Dr. Lee Mingione testified that Novak evinced no unusual personality traits for a sixteen-year-old and showed no elements of schizotypia and that Novak would have known right from wrong when he killed the boys. (Tr. Tr. 927-932). Dr. Paul Mansheim, who was board certified in child psychiatry (Tr. Tr. 983), found "[n]o psychological reason or no psychological disorder present that would have caused [Novak] not to know the difference between right and wrong for anything he might have done on March 4, 1991" and that no psychological disorder prevented him from understanding the criminality of his acts. (Tr. Tr. 1000). Dr. Mansheim also stated that no one could credibly claim that Novak acted in a sudden frenzy or impulse when he killed the two little boys. (Tr. Tr. 1017).

REASONS WHY THE WRIT SHOULD BE DENIED

Summary Of The Argument

It simply is not true, as the petitioner asserts, that the Virginia courts approved in this case a confession where the petitioner's "parent was deliberately excluded, against the parent's will, and without the knowing and intelligent waiver of her presence by the child." (Cert. Pet. 26-27). To the contrary, both the trial and appellate courts recognized that the absence of a parent is a relevant factor to be considered in deciding the voluntariness of a juvenile's confession. *See* Supp. Tr. 192; *Novak*, 20 Va. App. at 387, 457 S.E.2d at 408-09. Both courts just found that the petitioner and his mother had agreed that she

could leave the interview room and that his confession was otherwise voluntary.

As shown by the record and found by the trial court, Novak is a highly intelligent and "street wise" sixteen-year-old, who was only questioned by the police after he had brought himself to their attention, had attempted to manipulate the situation to his advantage and had then twice voluntarily gone to the station house for questioning with his mother before he confessed during the third, also voluntary, interview. The lack of police control over Novak during the culminating interview is evinced by the fact that the officer actually would have to go and look for Novak in the station house after their breaks.

Additionally, the evidence of Novak's guilt other than his confession was overwhelming, including expert testimony that the petitioner's "buck" knife matched a bloody imprint on the jeans of one of his young victims and had cut the branches used to cover the dead boys' bodies. Any error surely would have been harmless beyond a reasonable doubt.

In truth, what this Court has before it simply is the application of an established legal rule to the facts of a particular case, which is the situation least likely to warrant certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States* ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule.") As the trial judge noted, "viewing the two and a half hours of [the] tape were extremely helpful to me in making this determination. It presented a very, very comprehensive picture in my mind as to what the totality of the circumstances were. . . . "

(Supp. Tr. 194). This Court does not grant certiorari merely to second-guess such determinations. *See United States v. Johnson*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). The petition should be denied.

I(a). *The Miranda Issue*

Mrs. Novak acknowledged at the suppression hearing that her son had not been restrained in any way during or after the two previous interviews with the police; she admitted the police had contacted her before they talked to her son; she admitted she had given the police permission to talk to her son each time; she admitted that Det. Hoffman told her before she left the interview room on March 9 that he wanted to get into some sensitive areas with her son, not just ask him about his friends; she admitted that she was allowed to talk privately with her son before deciding to leave the room; she admitted Novak agreed that she could leave; and, she admitted Novak was not angry or upset at being interviewed on March 9. (Supp. Tr. 36-41). Mrs. Novak further acknowledged that her son had no difficulty with communication, having scored in the 95th percentile in reading and in the 99th percentile in language skills. (Supp. Tr. 41).

The interview between Det. Hoffman and Novak was videotaped, and there were no secrets about what went on in the interview room. (Supp. Tr. 49). The detective had no idea he was going to arrest Novak when Mrs. Novak and her son arrived at the station on March 9 (Supp. Tr. 59), and this still held true after Mrs. Novak

had left the interview room. (Supp. Tr. 61). ***The detective testified without refutation that Novak was free to leave up until the point when he actually confessed to the murders.*** (Tr. Tr. 624).

Detective Hoffman freely admitted having used some ruses during the interview, including telling Novak the police had gotten his fingerprints off one of the boy's jackets and that they had a witness who had seen him with the boys (which turned out to be true). (Supp. Tr. 51-52). Hoffman, however, had only decided to use the ruses "later while questioning [Novak]" because of some things the petitioner had said. (Supp. Tr. 54). If Novak had emphatically denied Hoffman's suggestions, it would have indicated "that he didn't have anything to do with it." (Supp. Tr. 62). Hoffman simply was "trying to judge whether [Novak] was holding something back by his reaction to these questions with this fictitious information." (Supp. Tr. 62).[2]

Finally, the psychiatric experts who had watched the videotape of Hoffman's interview of Novak saw no evidence that Novak suffered from delusions. (Tr. Tr. 999). Novak was not acting out a fantasy during the interview and, according to even the defense psychiatrist, the interview "illustrated Shawn in a fairly normal mode." (Tr. Tr. 888).

Miranda warnings are required by the Fifth Amendment only when a person is subjected to "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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[2] These were the only two "lies" the petitioner complained about at trial. (Supp. Tr. 5).

This rule also is applicable to juveniles. *Fare v. Michael C.*, 442 U.S. 707 (1979). Whether someone is "in custody" depends upon "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984). "[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. ___, 114 S. Ct. 1526, 1528-29 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

Even assuming for the sake of argument that Novak was the "focus" of the investigation – which Detective Hoffman denied and the trial judge found as a fact was not the case – this still would not mean that Novak was subjected to a custodial interrogation before he had admitted his guilt. *See Beckwith v. United States*, 425 U.S. 341, 349 (1976). Nor does someone have to be "Mirandized" just because they are interviewed in a police station. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

The circumstances surrounding an interrogation are "distinctly factual," *Thompson v. Keohane*, 515 U.S. ___, 116 S. Ct. 457 (1995), and a trial court's subsidiary factual findings are binding on this Court. *See Hernandez v. New York*, 500 U.S. 352, 365-66 (1991); *Miller v. Fenton*, 474 U.S. 104, 110-12 (1985). Here, the trial court made the following factual findings about Novak's questioning:

- Novak was being interviewed along with many others to see what information he had;
- The interview was more of a "fact finding" exercise than an interrogation;

- Det. Hoffman told Novak he was not a suspect at the start;
- Novak was never told he could not leave;
- Novak never asked to leave or to terminate the interview;
- Novak was not deprived of his freedom in any significant way during the interview; and
- Novak was "Mirandized" after he nodded affirmatively that he had killed the boys.

(Supp. Tr. 187-189).

While the ultimate question of whether a defendant was "in custody" for purposes of *Miranda* is a mixed question of law and fact allowing this Court to make the final decision, *see Thompson v. Keohane*, it still is noteworthy that the Virginia Court of Appeals found that the trial court's conclusion that Novak was not in custody until he initially admitted committing the murders (Supp. Tr. 189) had "abundant support" in the record:

> Here, defendant, accompanied by his mother, had twice voluntarily come to police headquarters for interviews. During a third visit, under like circumstances, defendant confessed to the offenses. He had been previously advised that he was neither under arrest nor a suspect, and Detective Hoffman only wanted to ascertain "anything . . . or anyone that [defendant] may have seen in the area."
>
> The interview was conducted in a carpeted room, "approximately ten-by-twelve," furnished with a table and several chairs. A "one-way

> mirror" permitted visual access from an adjoining room. Although defendant's mother was present at the inception of the interview, Hoffman persuaded her to leave the room, insisting that defendant could then more comfortably discuss "his friend's whereabouts" and "habits." Defendant was aware, however, that she remained nearby, still in the building.
>
> ***Until the confession, defendant was permitted to move about the building and "was . . . free to leave at anytime."***
>
> This evidence, considered with the entire record, including a video tape of the interview in issue, provided abundant support for the trial court's determination that defendant was not "in custody" at the time of his initial admission of guilt and prior *Miranda* warnings were, thus, unnecessary.

Novak, 20 Va. App. at 385-86, 457 S.E.2d at 408. The Court was correct.

I(b). *The Confession Was Voluntary*

Whether a confession was obtained voluntarily depends on whether the statement was the "product of an essentially free and unconstrained choice by its maker" or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). In answering this question, the courts look to a "totality of the circumstances" standard, which also applies when the defendant is a juvenile. *See Fare v. Michael C.* Although whether a statement is voluntary ultimately is a "mixed," rather than factual, question, the

trial court's subsidiary factual findings are entitled to a presumption of correctness. *See Miller*, 474 U.S. at 110-12.

A lie on the part of an interrogating police officer does not, of itself, require a finding that a resulting confession was involuntary. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (even outright falsehood by a police interrogator is but one factor to be considered in evaluating totality of the circumstances). "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

As for Novak's complaint that his mother was not in the interview room when he confessed, this not only was voluntary on the Novaks' part, it also was typical of his previous interviews with the police. It is "well established," moreover, that the mere absence of a parent does not, by itself, render a juvenile's waiver involuntary. *Grogg v. Commonwealth*, 6 Va. App. 598, 613, 371 S.E.2d 549, 571 (1988) (citing *United States v. White Bear*, 668 F.2d 409, 412 (8th Cir. 1982) (presence of parent not necessary to obtain valid confession of juvenile). The inquiry, after all, is not whether the parent's will was overborne, but the defendant's.

As the trial judge's factual findings make clear, this was not the case here:

> In this case . . . it's clear to me that Shawn Novak was highly intelligent. He was a high school student. He was articulate in his answers to the questions being asked of him. He obviously understood everything that was being

asked. He gave appropriate responses to those questions.

* * *

Shawn was a very willing participant. * * * He came down voluntarily to the police department. He participated in these interviews ostensibly with the motivation to try and aid the police.

Other factors include the use of drugs or alcohol, and there's absolutely no evidence of that. The emotional or mental disability of the individual, and there's absolutely no evidence of that. The deprivation of physical comforts – that conjures up long, isolated interrogations late at night. ***This is on a Saturday morning with the defendant's mother present, smoking cigarettes and drinking Pepsi, smiling, and obviously in complete control of himself and obviously with a full understanding of the interview process and what was being said and why he was there.***

I don't know of any psychological pressures in this case. Threats or promises of leniency – there's absolutely nothing along those lines. * * * [T]his was a rather benign interview in all its respects. The defendant was there voluntarily with his mother. It lasted certainly no longer than two and a half hours with several breaks in between. There was never any attempt by the defendant to leave; and, frankly, my impression from watching the tape and listening to the interview is that if the defendant had said, I'm through, I want to leave, he would have left.

> [T]hat tape . . . presented a very, very comprehensive picture in my mind as to what the totality of the circumstances . . . So after considering all of the evidence and what has been referred to as the totality of the circumstances, the court finds that the statement was a voluntary statement made by the defendant without any fear or threat or intimidation of any kind whatsoever.

(Supp. Tr. 189-195) (emphasis added).

Just as adults may waive their Fifth Amendment constitutional rights, so may juveniles. *Fare*, 442 U.S. at 724-25. The record establishes beyond question that Detective Hoffman had apprised Novak of his "Miranda" rights, that Novak indicated that he understood them, that Novak never asked to speak to his mother before confessing – much less to a lawyer, and that he acknowledged his rights and signed a waiver form. (Pet. App. A106-107; Supp. Tr. 57-59; Commonwealth's Exhibit I and 2 – advisal form and videotape). Given the trial court's subsidiary factual findings, this Court cannot reasonably say that Novak's confession was not voluntary.[3]

II. Error, If Any, Was Harmless

It is manifest that the refusal to suppress Novak's incriminating statement was proper. Even if it had been

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[3] The petitioner also asserts a reliance on the Sixth Amendment, but presents no such argument. Any such contention, in any event, would be unavailing as no " 'adversary judicial criminal proceedings' " had been initiated, *see United States v. Gouveia*, 467 U.S. 180, 188-90 (1984), and Novak does not contend that he ever asked for counsel, much less that any such request was not honored.

error to allow his confession to be admitted, however, any such error clearly would have been harmless beyond a reasonable doubt given the other evidence introduced at his trial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991) (harmless error rule adopted in *Chapman v. California*, 386 U.S. 18 (1967), applicable to unconstitutional confession).

A friend's mother who knew Novak well testified that "Charles Manson was his idol and he wanted to be just like him." Novak was the last person seen with the boys at the edge of the woods where their bodies were found the next day. Novak had lied about being a member of the search party and, although not present when the bodies were found, had told his friends how the boys' throats had been cut and that their bodies had been covered with branches. Novak was known to carry a large "buck" knife, and the boys had, in effect, been decapitated by a large knife. The forensic evidence was compelling, showing that Novak's knife was an exact match to an impression made in the blood on Scotty Weaver's jeans and had been used to cut the branches covering the boys' bodies. Psychiatric evidence, moreover, showed that there was nothing which would have prevented Novak from knowing right from wrong or from understanding the criminality of his acts when he killed the children.

Any error in admitting Novak's confession surely would have been harmless beyond a reasonable doubt. *See Fulminante*.

CONCLUSION

This Court should deny Shawn Paul Novak's petition for a writ of certiorari to the Supreme Court of Virginia's judgment refusing his appeal.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
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